STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 1, 2005
v	No. 252101 Wayne Circuit Court
MARIO SHARONN MCCREE, Defendant-Appellant.	LC No. 03-007591-01

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317, arising out of the shooting death of Sherrill Dorsey on May 16, 2003. The trial court sentenced defendant to twenty-five to fifty years' imprisonment. We affirm.

Defendant first argues that the admission of evidence regarding his post-arrest silence denied him his right to a fair trial. We disagree.

This Court reviews for an abuse of discretion a trial court's decision regarding the admission of evidence. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs only if an unprejudiced person, considering the facts on which the trial court relied, would find that there was no justification or excuse for the ruling made. *Id.* A decision on a close evidentiary question ordinarily cannot constitute an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Generally, testimony concerning a defendant's post-arrest, post-*Miranda* warning silence is inadmissible. *People v Crump*, 216 Mich App 210, 214; 549 NW2d 36 (1996). However, testimony regarding a defendant's silence may be properly admitted for a reason other than to contradict a defendant's assertion of innocence. *Id.* Such evidence may be admitted to rebut an implied assertion that the police did not afford defendant an opportunity to present his side of the story, *id.* at 215, or to rebut testimony by defendant that he cooperated fully with the police. *People v Vanover*, 200 Mich App 498, 503; 505 NW2d 21 (1993).

In this case, defendant was asked on direct examination whether he had spoken to sergeant Stevenson regarding what he knew and answered "yes." His counsel then asked him if he lied to her by asserting that he did not know anything or that he did not know Zoe (the person defendant implicated in the murder). To this defendant replied, "No, I didn't." He then testified

that he wanted to talk to her but was scared. This testimony implied that defendant tried to cooperate with the police. The prosecutor attacked the credibility of these statements by eliciting an admission from defendant that he did not tell Stevenson about Zoe after his arrest and by recalling Stevenson to testify that defendant never told her about Zoe before his arrest. This testimony was properly responsive to defendant's claim that he had told Stevenson about Zoe and his implied assertion that he had attempted to cooperate with the police. Consequently, the trial court did not err by permitting the admission of this evidence for the limited purpose of rebutting defendant's claim that he tried to cooperate with the police and tell them his version of the events. *Crump, supra*; *Vanover, supra*.

Defendant next contends that the prosecutor failed to present sufficient evidence to support his conviction of second-degree murder. We disagree.

When determining whether sufficient evidence exists to support a conviction, we must view the evidence in the light most favorable to the prosecution and determine whether a rational factfinder could conclude that the prosecutor proved every element of the crime charged beyond a reasonable doubt. *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002). We must also draw all reasonable inferences and make credibility determinations in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Testimony at trial established that defendant and the victim had been gambling together in a crack house where defendant worked. Because defendant had lost money to the victim, he went to his residence to get more money. After retrieving the money, defendant returned to the crack house with his girlfriend and resumed gambling with the victim. At some point, defendant and the victim left in the victim's black Cadillac to purchase marijuana. The victim's black Cadillac was next seen by a security guard driving down a road near the plant he patrolled. The security guard later saw this same Cadillac up on the sidewalk and crashed into a fence with its motor still running. The security guard testified that he heard two shots as he drove past the Cadillac. When the security guard drove by another time, he observed a man slumped over in the front seat and saw defendant, who was wearing a black hooded sweatshirt, climb out of the car and leave the scene. The security guard also testified that defendant returned to the scene in different attire and retrieved the victim's wallet, which he handed to a bus driver who had stopped to assist, and a cell phone.

The victim was found dead from gunshot wounds in the front seat of the Cadillac. He had been shot four times. In addition, forensic testimony suggested that the shots had been fired from inside the victim's car. One of the gunshot wounds was to the back of the victim's neck and was level to his head.

Defendant's girlfriend testified that when defendant returned home after leaving with the victim, he was not wearing the black hooded sweatshirt that he had been wearing when he left earlier in the day. She also testified that defendant asked her to lie to the police about his whereabouts on the day of the murder and asked her to dispose of a sweater that he had been wearing. She also stated that defendant initially told her that he had been involved in a shootout. Finally, defendant's girlfriend stated that, after defendant found out she had been talking with the police, he told her that he should have killed her.

Viewing the evidence in the light most favorable to the prosecution, and making all reasonable inferences and credibility determinations in favor of the jury verdict, there was ample evidence to support defendant's conviction. "The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004), quoting *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The testimony at trial clearly established that the victim died and that his death was caused by gunshots which evidence indicated were fired from within the victim's car. Likewise, although there was no direct testimony that defendant was the person who shot the victim, there was adequate circumstantial evidence establishing that defendant committed the crime. See *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (noting that circumstantial evidence and reasonable inferences drawn therefrom can constitute sufficient proof of the elements of an offense). Defendant was the only person in the car with the victim when they left the crack house and was identified by the security guard as the person he saw getting out of the victim's car after he heard gunshots. From this testimony alone, a reasonable jury could infer that defendant was in the car with the victim and fired the shots that ended his life. Furthermore, a reasonable jury could choose to believe defendant's girlfriend's testimony regarding his attempt to get her to lie to the police and dispose of his clothing and use this as further evidence of his guilt. Therefore, there was sufficient evidence to establish that defendant actually caused the victim's death.

In addition, there was evidence of malice. The malice requirement for second-degree murder includes the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Goecke, supra* at 464; *Fletcher, supra* at 559. "Malice can be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). The fact that the victim was shot four times, including one shot level to the back of his head, reasonably established that the shooter intended to kill the victim and, therefore, had the requisite malice. Finally, there was no evidence presented at trial indicating that the shooting was justified or mitigated in any way. Consequently, the evidence was sufficient to support defendant's conviction for second-degree murder.

Defendant next argues that the trial court erred by denying his motion for a directed verdict on the original charges of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b). We disagree.

We review de novo a trial court's decision on a motion for directed verdict to determine whether the prosecutor's evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. *Aldrich, supra* at 122-123; *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). First-degree murder is second-degree murder with the added element of premeditation or the perpetration or attempted perpetration of an enumerated felony. *People v Carter*, 395 Mich 434, 437; 236 NW2d 500 (1975). Because the evidence, which we have already determined was sufficient to support defendant's conviction of second-degree murder, was presented before defendant's motion for a directed verdict, we shall confine our analysis to the sufficiency of the evidence to support a finding beyond a reasonable doubt that defendant premeditated or committed an enumerated felony.

To establish first-degree premeditated murder, a prosecutor must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002); *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). To show premeditation there must be some interval between the initial homicidal intent and the ultimate action sufficient to afford a reasonable person time to take a "second look." *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). Premeditation and deliberation can be inferred from the circumstances surrounding the offense, including the parties' prior relationship, the actions of the accused both before and after the killing, and the circumstances of the killing itself. *Ortiz, supra* at 301; *Haywood, supra* at 229. Minimal circumstantial evidence is sufficient to prove the defendant's state of mind. *Ortiz, supra* at 301.

The jury heard evidence that defendant had lost money to the victim and that, just before the victim was murdered, they left together in the victim's Cadillac. The jury also heard evidence that the victim had been shot four times and that one shot was from behind and level with the victim's neck. The jury also heard evidence that indicated defendant attempted to cover up his involvement with the victim's death by changing his attire, telling his girlfriend he was in a shoot out, and asking his girlfriend to dispose of his sweater and lie about his whereabouts at the time of the murder. Furthermore, the jury heard evidence that, although the victim had apparently won money throughout the night from defendant, his wallet was empty when defendant handed it to the bus driver. Taking this evidence in the light most favorable to the prosecution, the jury could infer that defendant had formed the intent to rob and kill the victim when they left together to buy marijuana. Likewise, the nature of the shot to the back of the victim's neck could also be evidence that the shooter deliberately and premeditatedly shot the victim. Finally, the evidence of defendant's attempts to disassociate himself from the murder could be construed as part of an overall premeditated plan to murder the victim. Consequently, the trial court did not err when it refused to grant defendant's motion for a directed verdict on the premeditated murder charge.

The trial court also properly denied the motion for directed verdict on the first-degree felony murder charge. To establish first-degree felony murder, a prosecutor must prove: (1) the killing of human being, (2) with intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any felony enumerated in the felony murder statute, MCL 750.316(1)(b). *Nowack, supra* at 401; *People v McCrady*, 244 Mich App 27, 30-31; 624 NW2d 761 (2000). One of the enumerated felonies in MCL 750.316(1)(b) is larceny of any kind. The basic elements of larceny are: (1) an actual or constructive taking of property, (2) of another, (3) and a carrying away or asportation of the property, (3) with felonious intent, (4) without the consent and against the will of the owner. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999).

Defendant argues that the prosecutor presented insufficient evidence of a larceny to support submitting the first-degree felony murder charge to the jury. However, it can be inferred from the circumstances of this case that defendant took money out of the victim's wallet after he was killed. Although defendant had lost money to the victim while gambling earlier in the day, there was no money in the victim's wallet when defendant handed it over to the bus driver. Furthermore, one of the children on the bus testified that he did not see defendant take any

money out of the victim's wallet when defendant returned to the scene in the taxi cab. Therefore, a reasonable jury could infer that defendant took the money from the victim's wallet immediately after shooting him. Accordingly, viewed in a light most favorable to the prosecution, there was sufficient evidence to submit the first-degree felony murder charge to the jury.

Defendant next contends that the trial court erred by admitting evidence of flight and that defense counsel was ineffective for failing to object to such evidence. We again disagree.

Because defendant did not object to the evidence of flight, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763, 774. Further, to establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant argues that the trial court improperly admitted evidence that he was hiding in an attic when the police came to arrest him. Evidence of flight is generally relevant and admissible. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995); *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993), overruled on other grounds by *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996). The term "flight" includes fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. *Coleman, supra* at 4. "Such evidence is probative because it may indicate consciousness of guilt, although it is alone insufficient to sustain a conviction." *Id.* As stated in *Cutchall*, "[a] defendant's flight becomes part of a seamless web of evidence that a rational trier of fact could employ to find the elements of the crime proven beyond a reasonable doubt." *Id.* at 401. Therefore, the evidence of defendant's flight was both relevant and admissible to demonstrate consciousness of guilt.

Defendant also argues that the evidence that he hid in an attic was more prejudicial than probative. Unfair prejudice exists when the jury might give marginally relevant evidence undue or preemptive weight or when it would be inequitable to allow use of the evidence. *In re MU*, 264 Mich App 270, 285 ; 690 NW2d 495 (2004), citing *Allen v Owens-Corning Fiberglass Corp*, 225 Mich App 397, 404; 571 NW2d 530 (1997). Defendant's act of hiding in the attic was not so extreme or objectionable that admission of the evidence *unfairly* prejudiced him or tended to elicit undue or preemptive weight from the jury. Therefore, the evidence was properly admitted. Because the admission of the evidence was not erroneous, defense counsel was not ineffective for failing to object to its admission. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004).

Defendant also states that the evidence of flight was barred by MRE 404(b). Our Supreme Court has stated that, for other acts evidence to be admissible under MRE 404(b), (1) the evidence must be offered for some purpose other than a character to conduct theory, (2) the evidence must be relevant, and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). As we have already noted, the evidence of flight was properly admitted to show consciousness of guilt rather than to make an impermissible character to conduct inference.

Likewise, as we have already noted the evidence was relevant and was not substantially outweighed by unfair prejudice. Therefore, the evidence was not barred by MRE 404(b).

Finally, defendant contends that the trial court erred by relying on MCR 6.508(D) in denying relief from judgment. Because defendant did not move for relief from judgment in the trial court, we find no merit to this issue.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski